

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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LIGHTHOUSE BAPTIST CHURCH,
INC, et al. 20CV7000
Plaintiffs)
vs.
Rochester, New York
CHEMUNG COUNTY, ET AL. August 16, 2023
Defendants. 11:00 a.m.

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ORAL ARGUMENT

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ELIZABETH A. WOLFORD
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G

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THE CLERK: We are on the record in the
matter of the Lighthouse Baptist Church Inc versus
Chemung County, et al, 20CV7000.

THE COURT: All right. Good morning,
everybody. I don't think my microphone is on.

Let's have appearances for the record.

On behalf the Plaintiffs?

MR. RUPP: Yes, good morning, your Honor.
Anthony Rupp, Rupp Pfalzgraf on behalf of the Plaintiffs
Lighthouse Baptist Church, et al.

THE COURT: Good morning, Mr. Rupp.

MR. RUPP: Good morning.

THE COURT: And on behalf of the Defendants?

MR. PRIAL: Victor Prial, Smith Sovik, on
behalf of the Defendants.

THE COURT: How do you spell your last name?

MR. PRIAL: P-r-i-a-l. Trial with a P.

THE COURT: That's easy. Good morning, Mr.
Prial.

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11:15:25 2 MR. PRIAL: Good morning.

11:15:26 3 THE COURT: So, this case is kind of a
11:15:30 4 procedural quagmire. It's reminding me of a law school
11:15:36 5 exam question. And let me tell you what my concern is
11:15:40 6 at this point. And that is when issued my decision back
11:15:51 7 in September of '21 denying the first motion for fees
11:15:58 8 concluding that the motion was untimely based on the, I
11:16:06 9 think, it's the Tenth Circuit decision in *Spirit* -- or
11:16:09 10 Eighth Circuit decision in *Spirit Lake Tribe*, 5 F. 3d
11:16:16 11 849. At that point in time, the complaint, as it stood,
11:16:21 12 only sought declaratory and injunctive relief. And,
11:16:27 13 essentially, the preliminary injunction, arguably
11:16:31 14 granted the relief that was being sought in the
11:16:34 15 complaint. And while the action was still pending, I
11:16:39 16 think one could argue that the issues that were pled at
11:16:45 17 that point in time had effectively been resolved, that
11:16:49 18 the Plaintiffs had obtained all of the relief that they
11:16:52 19 were presently seeking. And it was also on that basis
11:16:58 20 that I was persuaded by the *Spirit Lake Tribe* case that
11:17:04 21 the motion needed to have been filed within 14 days
11:17:07 22 after the preliminary injunction was granted, but
11:17:10 23 nonetheless granted the extension of time to file a
11:17:13 24 motion.

11:17:14 25 So after I issued that decision, an amended

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11:17:19 2 complaint was filed in November of 2021 as of right.

11:17:27 3 And that amended complaint no longer sought any

11:17:30 4 declaratory or injunctive relief, I think, thus,

11:17:34 5 confirming my sense that really, at the time the PI was

11:17:39 6 granted based on what was pled in that initial

11:17:42 7 complaint, that the relief had effectively been granted

11:17:46 8 that the Plaintiffs were seeking. But then the

11:17:49 9 Plaintiffs had a right, because the Defense missed the

11:17:52 10 deadline to answer, and the Plaintiff certainly had the

11:17:58 11 right to file an amended complaint as of right, and they

11:18:01 12 did that in November of 2021, but now they were adding

11:18:06 13 additional causes of action and seeking damages.

11:18:12 14 And then, as we all know, in September of

11:18:16 15 2022, I issued another Decision and Order that addressed

11:18:20 16 various issues, and, among other things, granted the

11:18:24 17 Plaintiffs' application for leave to file a second

11:18:26 18 amended complaint, which was done, which even greatly

11:18:30 19 expanded beyond what was in the amended complaint the

11:18:33 20 causes of action that were being alleged. And what I'm

11:18:37 21 having trouble, I guess, coming to a conclusion at this

11:18:46 22 point is that I can determine -- I mean, first of all,

11:18:50 23 there is the issue as to whether or not by obtaining a

11:18:53 24 stipulated preliminary injunction, does that make a

11:18:56 25 party a prevailing party. And I think that is something

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11:19:02 2 that nobody has cited any case law standing for that
11:19:05 3 exact proposition. It is something that I would have to
11:19:08 4 resolve if the stipulated preliminary injunction was
11:19:18 5 granted and the complaint, as it initially stood, was
11:19:22 6 the only pleading that was left. But because of these
11:19:26 7 additional causes of action, I now am also struggling
11:19:31 8 with how can I determine that the Plaintiffs are a
11:19:35 9 prevailing party at this point when there is additional
11:19:39 10 claims in the lawsuit. And wouldn't the resolution of
11:19:42 11 these additional claims inform my conclusion as to
11:19:48 12 whether or not the Plaintiffs will ultimately be a
11:19:52 13 prevailing party? And what was I particularly persuaded
11:19:56 14 by is a case that was issued relatively recently, it's
11:20:02 15 from the Eastern District of New York, and it's *IME*
11:20:07 16 *WatchDog, Inc versus Gelardi*, 2022 Westlaw 16636766
11:20:19 17 EDNY, November 2nd, 2022. It dealt with attorney fee
11:20:23 18 application in a defend trade secrets case. But it was
11:20:29 19 largely the same issues here, which is whether or not
11:20:32 20 the party that obtained the preliminary injunction was a
11:20:37 21 prevailing party. And what the court said was, and this
11:20:40 22 is at page 3, quote, "The Court has not found any cases
11:20:45 23 nor has Plaintiff provided any in which a party has been
11:20:49 24 granted prevailing party status before establishing that
11:20:56 25 the party cannot obtain final judgment. The Court notes

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11:21:00 2 that in the cases considering attorney fees in which
11:21:04 3 prevailing party status was conferred after only a
11:21:11 4 preliminary injunction, the underlying cases were mooted
11:21:14 5 by the time the Courts ruled."

11:21:16 6 And that seems to largely be the case. I
11:21:19 7 mean, all these cases where even the Eighth Circuit case
11:21:22 8 that I relied on, they all deal with situations where by
11:21:27 9 the time the attorney fees application is filed, even if
11:21:32 10 the case is still pending, the remaining claims have
11:21:36 11 been mooted because all of relief was effectively
11:21:40 12 granted with the preliminary injunction. And I want to
11:21:42 13 give you each, I just want to tell you where I'm coming
11:21:45 14 at this from, and I'll give you each an opportunity to
11:21:48 15 respond. But my inclination at this point is to again
11:21:52 16 deny the application for attorney fees without
11:21:54 17 prejudice, but at this point say it's premature until
11:21:57 18 the case is finally resolved. Which I appreciate is
11:22:00 19 somewhat inconsistent with the previous finding that was
11:22:03 20 it was untimely, but at the time I found it was
11:22:06 21 untimely, the only claims being pursued by the
11:22:10 22 Plaintiffs were injunctive relief. Now that the
11:22:14 23 Plaintiffs have amended their complaint and they are
11:22:16 24 seeking damages and additional causes of action, I think
11:22:20 25 we have to see how that all sorts out and that could

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11:22:26 2 strengthen and bolster the Plaintiffs' claim that
11:22:28 3 obtaining the preliminary injunction does make it a
11:22:31 4 prevailing party. I mean, for instance, if the
11:22:34 5 Plaintiffs are successful with some of these other
11:22:36 6 causes of action and obtain damages against the
11:22:40 7 Defendants, I think that just further supports a finding
11:22:44 8 that the Plaintiffs are prevailing parties. But if the
11:22:47 9 flip side of that occurs, if the Plaintiffs are not
11:22:49 10 successful with these other causes of action, then, it,
11:22:56 11 I think, calls into question whether or not a stipulated
11:23:00 12 preliminary injunction really could cause a party to be
11:23:04 13 a prevailing party. And the other case that I was -- I
11:23:08 14 mean, all of the cases that are relevant have been cited
11:23:11 15 in my prior decisions, but other than that *IME* case that
11:23:15 16 I just gave you the cite for because that was just
11:23:17 17 decided. But what I was persuaded by was the *Husain*
11:23:24 18 case from the Second Circuit, which is *Husain v.*
11:23:31 19 *Springer*, 579 F. Appx. 3 2014 case from the Second
11:23:37 20 Circuit. One of the things that the Court looked at in
11:23:39 21 that case was whether or not -- in deciding whether or
11:23:42 22 not obtaining the preliminary injunction made the party
11:23:46 23 a prevailing party, the Court considered whether or not
11:23:55 24 the award of nominal damages should impact that
11:23:59 25 analysis.

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11:24:01 2 But I want to give you each an opportunity
11:24:03 3 to respond to that and this was part of what I was
11:24:08 4 grappling with when I issued my last decision in
11:24:11 5 September of 2022. And I think the additional filings
11:24:14 6 really haven't answered some of these questions. I
11:24:18 7 mean, in other words, nobody has found any case where
11:24:22 8 just a stipulated PI was found to cause a party to be a
11:24:28 9 prevailing party. I'm not saying it can't. It very
11:24:31 10 well may justify a conclusion that a party is a
11:24:36 11 prevailing party. But the other cases really support
11:24:39 12 the notion that you really have to wait, when you have
11:24:43 13 damages claims, you have to wait until the case is
11:24:46 14 resolved to make determinations whether a party is a
11:24:49 15 prevailing party.

11:24:50 16 I'll let you respond first, Mr. Rupp.

11:24:54 17 MR. RUPP: Your Honor, the podium or table?

11:24:56 18 THE COURT: You can sit at the table, that's
11:24:58 19 fine.

11:24:58 20 MR. RUPP: Your Honor, I appreciate the
11:24:59 21 Court's summary there. But I would respond in this
11:25:03 22 fashion. That the amendment of the complaint, I mean,
11:25:07 23 took place after a lot of your Honor's orders had come
11:25:10 24 down that I believe were law of the case.

11:25:12 25 THE COURT: Just one of them. So the only

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11:25:15 2 one that was -- the amended complaint was filed as of
11:25:19 3 right in November of 2021 after my initial denial of the
11:25:23 4 application on the grounds that it was untimely.

11:25:25 5 MR. RUPP: And Judge, you know, I honestly,
11:25:28 6 I'll be totally honest with the Court, I didn't see any
11:25:31 7 of this in opposing counsel's opposition papers to the
11:25:37 8 motion, I'm not sure I am fully prepared to address.

11:25:41 9 THE COURT: This was addressed in my
11:25:42 10 decision of September of 2022. I specifically said the
11:25:47 11 parties need to address, number one, is a stipulated PI
11:25:50 12 sufficient for prevailing party status; and two, how
11:25:53 13 does the filing of the amended -- second amended
11:25:57 14 complaint or amended complaint and these additional
11:26:02 15 claims impact that analysis.

11:26:03 16 MR. RUPP: And, Judge, I would say it
11:26:06 17 doesn't impact them at all because that was a permissive
11:26:09 18 amendment to the claim. We could have sued. They are
11:26:12 19 very, very different causes of action. They sound in
11:26:17 20 defamation primarily.

11:26:18 21 THE COURT: Not your first amended
11:26:19 22 complaint. So your first amended complaint added some
11:26:22 23 additional constitutional claims, but what it
11:26:25 24 essentially did, in my view, is it replaced the
11:26:28 25 injunctive relief that was being sought with the damages

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11:26:33 2 claims. It wasn't until the second amended complaint
11:26:37 3 that the defamation/libel claims got added.

11:26:44 4 MR. RUPP: Judge, it's our view that there
11:26:46 5 are really different issues here. The first issue was
11:26:48 6 the crux of the original complaint and the one on which
11:26:51 7 we've been seeking fees. And it had to do with
11:26:55 8 reopening the church preventing the county from imposing
11:26:59 9 requirements on the church that transcended those that
11:27:02 10 were being put out by the New York State Department of
11:27:05 11 Health. And on that self-contained complaint, which was
11:27:07 12 the basis for the first fee award, and the basis for all
11:27:10 13 three motions now, we were, and I believe have
11:27:13 14 demonstrated, that we were the prevailing party.

11:27:15 15 THE COURT: But do you have any case where a
11:27:21 16 court has decided prevailing party status mid lawsuit
11:27:26 17 when there are claims that remain in the lawsuit,
11:27:32 18 including, in this case, some of the same causes of
11:27:35 19 action where the parties -- the Plaintiffs are just
11:27:38 20 seeking now damages as opposed to injunctive relief?

11:27:42 21 MR. RUPP: Judge, I don't know that we do
11:27:44 22 have a case cite. We cited the *Estraverne* case where
11:27:48 23 the Plaintiff was considered a prevailing party as a
11:27:51 24 result of a preliminary injunction that was granted. I
11:27:55 25 don't know from the recitation of the memorandum of law

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11:27:58 2 where that case went from there. I would say, Judge,
11:28:01 3 that, you know, if -- what I'm struggling with, if we
11:28:05 4 could have simply sued a separate case against the
11:28:09 5 County of Chemung as opposed to amending the complaint,
11:28:12 6 apparently, from what I'm hearing from the Court, that
11:28:14 7 would have resolved the issue. Then the Court would
11:28:16 8 have gone on to determine whether a stipulated
11:28:19 9 preliminary injunction is as good as one that is earned
11:28:22 10 in opposition. I would submit from all of the briefing
11:28:24 11 that we have provided to the Court that it is. In fact,
11:28:27 12 it should be encouraged because it's more efficient for
11:28:31 13 the parties; less legal fees, less use of court
11:28:37 14 [resources if you settle a case, that should always be
11:28:38 15 encouraged, so we would be the prevailing party.

11:28:40 16 I don't think then on the self-contained
11:28:43 17 complaint, which was the basis for the first fee
11:28:45 18 request, which came in before the amendment, that there
11:28:48 19 should be any question that we are the prevailing party
11:28:52 20 and none of the Court's issues would have arisen. So
11:28:55 21 the fact that there was then this permissive addition of
11:29:00 22 new claims, I don't think, should affect the analysis
11:29:03 23 because that is just elevating the procedural form over
11:29:06 24 the substance. Again, if we could have sued a separate
11:29:11 25 case as opposed to just keeping the vehicle alive that

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11:29:14 2 we already had commenced, and the Court would have then
11:29:19 3 gone on to award fees based on the stipulated injunction
11:29:22 4 for the termination of all of the relief requested in
11:29:25 5 the first complaint, we would satisfy all of the
11:29:28 6 conditions the Court mentioned. Beyond that, Judge,
11:29:30 7 there are opportunities, and we didn't address it here
11:29:34 8 because I didn't think it was really before the Court,
11:29:37 9 but it is not the case always that a party is entitled
11:29:42 10 to prevailing party status and a consideration of legal
11:29:46 11 fees only at the end of the case. There are instances
11:29:49 12 where achieving significant relief --

11:29:52 13 THE COURT: But the cases I've seen, and I
11:29:56 14 agree with you, I absolutely agree with you. But the
11:29:59 15 only cases I've seen is where achieving that relief
11:30:02 16 through a preliminary injunction effectively moots the
11:30:06 17 rest of the claims.

11:30:07 18 MR. RUPP: Well, Judge, and I think it did
11:30:10 19 effectively moot --

11:30:11 20 THE COURT: But you amended the complaint.
11:30:12 21 The Plaintiffs are the ones that decided --

11:30:14 22 MR. RUPP: I understand that, Judge.

11:30:15 23 THE COURT: Don't interrupt me, Mr. Rupp.

11:30:18 24 MR. RUPP: I'm sorry.

11:30:18 25 THE COURT: The Plaintiffs are the ones that

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11:30:20 2 decided to take the step of amending the complaint to
11:30:23 3 assert some of the same causes of action that were in
11:30:26 4 the original complaint, but, instead, to seek damages
11:30:29 5 for those causes of action, instead of, for instance,
11:30:33 6 commencing a totally separate lawsuit. So, the
11:30:36 7 Plaintiffs are the captains of the ship, so to speak.
11:30:41 8 It's their lawsuit. They are the ones that took these
11:30:45 9 procedural steps. But now I have a statute that says
11:30:48 10 you can obtain attorney's fees when you're a prevailing
11:30:51 11 party, but there is all of the case law suggesting that
11:30:56 12 it would be premature to determine prevailing party
11:30:59 13 status where you have claims that are yet to be
11:31:03 14 resolved. And it could be that if the Plaintiffs end up
11:31:06 15 losing with respect to all of their other causes of
11:31:09 16 action that they've now asserted, that that could
11:31:13 17 influence how I resolve the prevailing party status of a
11:31:16 18 party that obtains a preliminary injunction by
11:31:20 19 stipulation because of the fact that there are no cases
11:31:23 20 finding a party to be a prevailing party where they
11:31:28 21 obtain a stipulated preliminary injunction.

11:31:31 22 MR. RUPP: Judge, I would respond to that by
11:31:34 23 saying, again, that I think the purpose behind 42 U.S.C.
11:31:37 24 section 1988 fees is to encourage attorneys to take
11:31:44 25 cases on behalf of clients who have had their

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2 constitutional rights violated where they otherwise
11:31:47 3 would not have access to the legal process. And I don't
11:31:50 4 think amending the complaint really should be a gotcha.
11:31:53 5 If we could have, and I think the Court might be mostly
11:31:57 6 there with us, moved for the fees and obtained them
11:32:00 7 based on achieving all of the relief that we requested
11:32:04 8 in the initial complaint, and could have gotten our fees
11:32:07 9 then, I don't think it's fair, in the absence of any
11:32:12 10 case law saying this, to say then, well, if you amend
11:32:15 11 the complaint to add additional theories, including
11:32:18 12 state law claims for defamation, now you've taken
11:32:21 13 yourself out of getting the fees on that self-contained
11:32:25 14 complaint that you initially moved for.

11:32:30 15 THE COURT: Well, I'm not saying that you've
11:32:32 16 taken yourself out of getting the fees. I think it
11:32:35 17 causes the application to arguably be premature.

11:32:39 18 MR. RUPP: Well, Judge, and that is where, I
11:32:41 19 guess, in the absence of case law saying that --

11:32:44 20 THE COURT: All of the case law says you
11:32:46 21 determine prevailing party status at the end of the
11:32:49 22 case. There is an exception if you obtain,
11:32:53 23 substantially, what you were seeking and the rest of the
11:32:56 24 claims in the lawsuit are moot.

11:32:58 25 There is no case supporting an award of

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11:33:01 2 attorney's fees in this particular circumstance, both
11:33:05 3 stipulated preliminary injunction and where you have
11:33:11 4 viable causes of action that remain for damages that
11:33:14 5 have yet to be resolved.

11:33:16 6 MR. RUPP: Judge, if I may, I think the
11:33:18 7 chronology here is important. At the time we moved for
11:33:21 8 the fees in an application that your Honor ultimately
11:33:23 9 concluded was timely, the only complaint that was before
11:33:26 10 the Court was the one on which we believe we had
11:33:30 11 prevailed by achieving the stipulated preliminary
11:33:33 12 injunction.

11:33:33 13 THE COURT: No, that is not correct. That
11:33:35 14 is not correct.

11:33:35 15 MR. RUPP: I'm sorry.

11:33:36 16 THE COURT: Because there was the initial
11:33:39 17 application for fees that I denied as untimely.

11:33:42 18 MR. RUPP: Right. But your Honor ultimately
11:33:45 19 concluded it was timely.

11:33:47 20 THE COURT: No, no. I gave you an extension
11:33:49 21 of time to file that application. And once you did
11:33:51 22 that, you had already amended the complaint.

11:33:54 23 MR. RUPP: All right. Judge, I guess I lose
11:33:56 24 on the chronology, too. The last point I will make in
11:33:59 25 response to this is I just think that using a permissive

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11:34:03 2 joinder situation amending our complaint as of right to
11:34:07 3 take us out of a situation where, on that first
11:34:11 4 self-contained complaint, we were entitled to fees,
11:34:13 5 really defeats the purpose of section 1988 fees.

11:34:17 6 THE COURT: You're making a big leap there
11:34:19 7 to say you were entitled to fees because there has been
11:34:22 8 no case that anybody has cited nor have I made a
11:34:25 9 decision that a stipulation to enter a preliminary
11:34:33 10 injunction causes a part to be a prevailing party.

11:34:35 11 MR. RUPP: Judge, I always thought that then
11:34:37 12 would force parties to litigate a matter that they have
11:34:41 13 already settled only to achieve a status under Section
11:34:42 14 1988, I don't think that is the purpose of the statute.

11:34:45 15 THE COURT: I don't disagree with you. Look
11:34:47 16 it, I'm not suggesting to you that any of this makes a
11:34:50 17 lot of sense. I'm not suggesting to you that this
11:34:53 18 couldn't cause, at the end of the day, the attorney's
11:34:55 19 fees that the Plaintiff's are entitled to be
11:35:03 20 significantly larger than what they are right now. That
11:35:06 21 is why I called it at the beginning it is kind of a
11:35:09 22 procedural quagmire because this could really ratchet up
11:35:15 23 the attorney fees that the Plaintiffs are able to seek.

11:35:19 24 MR. RUPP: Judge, I appreciate that concept,
11:35:21 25 but the problem with it is that we commenced this action

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11:35:24 2 back in, I believe, 2020, and we achieved the relief
11:35:24 3 that we sought. We then spoke to the client about
11:35:36 4 pursuing essentially different and additional claims,
11:35:36 5 always in the belief we had gotten them a great result.
11:35:40 6 We had won for them, vindicated their constitutional
11:35:43 7 rights, conserved judicial resources, that we were
11:35:46 8 entitled to fees. We then moved for the fees in what we
11:35:50 9 thought was a timely application. And, you know, now to
11:35:52 10 find that on these other theories that we could have
11:35:56 11 asserted in a separate action, that would have taken
11:35:59 12 care of, I think, every procedural question the Court
11:36:01 13 has raised, we could have done that. But by not doing
11:36:04 14 that, we somehow now have walked our way out of what
11:36:08 15 your Honor has not ruled in our favor, but what I
11:36:12 16 believe was a very strong application for fees. And
11:36:14 17 that is where I think in the absence of cases that say
11:36:17 18 that is the result, this Court would have both the power
11:36:30 19 and I believe the motivation to say yes. Why if they
11:36:31 20 could bring the claims in a separate lawsuit, would this
11:36:33 21 Court conclude --

11:36:33 22 THE COURT: I guess where I'm quarrelling
11:36:34 23 with you Mr. Rupp, among other things, you're saying in
11:36:38 24 a separate lawsuit, and the reality is that the claims
11:36:41 25 in the second amended complaint and the causes of action

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11:36:41 2 in the original amended complaint are some of the same
11:36:59 3 causes of action. So it's not as though these are
11:37:02 4 totally different causes of action, it's not as if they
11:37:06 5 are libel causes of action.

11:37:07 6 MR. RUPP: Judge, if I may, my firm is bled
11:37:11 7 dry because of these causes of action. We've spent
11:37:15 8 considerably more in trying to establish our right to
11:37:17 9 fees than the entire case was worth. We haven't been
11:37:19 10 paid in three years. We're representing a
11:37:22 11 not-for-profit and they cannot pay us. I'm being bled
11:37:23 12 absolutely dry. And I understand that is not the
11:37:25 13 Court's intention and you're raising valid procedural
11:37:26 14 issues.

11:37:26 15 THE COURT: Look, it I don't make the law,
11:37:28 16 Mr. Rupp.

11:37:29 17 MR. RUPP: I know, but I'm asking the Court.

11:37:31 18 THE COURT: 1988. There is nothing in 1988
11:37:34 19 because that is where these attorney fees applications
11:37:38 20 are pursued. And it's always under circumstances where
11:37:43 21 the Plaintiffs' attorneys are taking on, in many cases,
11:37:47 22 very worthy causes advancing the civil rights of the
11:37:50 23 Plaintiffs. And yet there is nothing in that law
11:37:53 24 allowing for interim awards of attorney fees, it's only
11:37:59 25 if you are the prevailing party.

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11:38:01 2 MR. RUPP: Judge, what I'm asking the Court
11:38:03 3 is the additional state law causes of action, I think,
11:38:06 4 were permissive joinder situation, they are entirely
11:38:10 5 different. If I were to drop the amended damages, there
11:38:15 6 has been no discovery that has happened on those
11:38:18 7 theories, to my knowledge, there has been no prosecution
11:38:21 8 of that case while we've been waiting to see whether we
11:38:26 9 can get an injection of additional fees into the case.
11:38:29 10 If, for example, if I were to agree to drop those
11:38:31 11 amended causes of action and just restore the complaint
11:38:34 12 to the original application, which was for the
11:38:38 13 injunctive relief to get the church back open --

11:38:40 14 THE COURT: You would have to get the
11:38:42 15 Court's permission to do that.

11:38:43 16 MR. RUPP: Right. And if I were to move for
11:38:45 17 that, I'm wondering if that would restore the status quo
11:38:49 18 ante that was the situation when we first filed for the
11:38:52 19 fee request, and put us in a position for the Court to
11:38:55 20 determine the question, which I realize remains at
11:38:58 21 issue, which is whether a stipulated preliminary
11:39:02 22 injunction entitles us to prevailing party status. And
11:39:08 23 at that point we would let the permissive part -- it's
11:39:08 24 possible the state law claims would be, you know,
11:39:11 25 dismissed because there would be no longer a basis for

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11:39:14 2 federal jurisdiction. We don't think we're entitled to
11:39:19 3 legal fees on the defamation claims. One of the things
11:39:22 4 your Honor said, the fee award could go larger and could
11:39:25 5 help the Court to determine who prevailed. The
11:39:28 6 defamation and the other state law claims we asserted --

11:39:31 7 THE COURT: But you have constitutional
11:39:32 8 claims that you're now seeking damages.

11:39:35 9 MR. RUPP: I'm saying if we were to drop the
11:39:37 10 damages claims and pursue -- my belief, Judge, when I
11:39:40 11 spoke to the clients and my colleagues about this is the
11:39:43 12 main thrust of the two amendments, from our perspective,
11:39:46 13 is a state law claim.

11:39:47 14 THE COURT: But the first amendment didn't
11:39:49 15 have any defamation in there.

11:39:51 16 MR. RUPP: I understand, Judge. But as we
11:39:53 17 came up with the better theory and asserted the now
11:39:56 18 governing second amended complaint, that was the horse
11:39:58 19 that wanted to ride. That is a pure state law claim. I
11:40:03 20 don't know that its outcome would really inform the
11:40:06 21 Court on a prevailing party status. And I believe if we
11:40:09 22 dropped the damages claims under the federal theories,
11:40:12 23 probably this Court, you know, would send, under the
11:40:17 24 circumstances, us onto state court to resolve the
11:40:18 25 defamation claim there no longer being any federal

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11:40:21 2 question. And I guess my question would be would the
11:40:22 3 Court be willing to entertain such a motion, which I
11:40:24 4 believe would rectify the situation where the amendments
11:40:27 5 don't -- because there has been no real legal -- we're
11:40:30 6 not claiming the legal involved in asserting those, that
11:40:35 7 is not before the Court. What is before the Court now
11:40:37 8 is just the legal with respect to the preliminary
11:40:41 9 injunction. And if the Court would allow us to take
11:40:44 10 that step and entertain a motion for us to drop those
11:40:47 11 theories, if that would not reflect negatively on our
11:40:51 12 fee application, then I think, you know, on behalf of my
11:40:55 13 client and my law firm, that we would take that step to
11:40:59 14 rectify some of the procedural issues your Honor has
11:41:02 15 indicated. Because, otherwise, based on what your Honor
11:41:04 16 has said this morning, we might be looking at, you know,
11:41:07 17 several more years of litigation for a not-for-profit
11:41:11 18 that can't pay us on a case that we thought anyway was
11:41:15 19 going to be a relatively quick result, which we achieved
11:41:18 20 with a stipulated injunction. And now the fee requests
11:41:22 21 have dragged on for, not any fault of the Court,
11:41:24 22 certainly, but from my perspective as the principal of
11:41:28 23 the firm, the fee requests have dragged on and become
11:41:31 24 twice as expensive as handling the underlying case. And
11:41:35 25 I'm throwing it out there, and I know the Court doesn't

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11:41:38 2 give legal advice, I would be willing to take that step
11:41:41 3 for the simple reason, it was always the defamation case
11:41:45 4 that we really wanted to pursue with the amendments.
11:41:49 5 Yes, like all attorneys do, we have other theories in
11:41:51 6 there that would entitle us to damages, but it was
11:41:51 7 defamatory aspects of what happened, and we could pursue
11:41:58 8 those. We could have pursued those in state court. And
11:42:01 9 we could have pursued those in a separate lawsuit and
11:42:01 10 not done the amending process that has caused the
11:42:07 11 Court's concerns this morning. I think I have a way to
11:42:11 12 rectify that, perhaps resolve the federal case and bring
11:42:14 13 us back to a pure situation where the Court could rule
11:42:17 14 on whether the stipulated preliminary injunction
11:42:19 15 entitles us to prevailing party status or not.

11:42:23 16 THE COURT: So, I think that if you took
11:42:26 17 steps that ultimately we'd have to get the defense view
11:42:30 18 of this and you'd have to get court approval, but if you
11:42:34 19 took steps to discontinue, essentially, the federal
11:42:39 20 claims, and to dismiss without prejudice the state
11:42:45 21 claims to be reasserted presumably in state court, then
11:42:50 22 we would be at the point where the case would be
11:42:54 23 resolved. And I could determine then that ultimate
11:42:58 24 issue as to whether or not a stipulated preliminary
11:43:01 25 injunction under these circumstances entitle the party

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11:43:04 2 to prevailing party status. And, as I said, I'll tell
11:43:07 3 defense counsel this, I haven't resolved that issue, but
11:43:10 4 my inclination is I agree with the logic of the
11:43:13 5 Plaintiffs' argument here, which is that just because
11:43:18 6 you have such a strong preliminary injunction, but
11:43:26 7 you're fighting on the merits, but stipulates on the
11:43:28 8 merits to factual findings being made by the Court, it
11:43:32 9 seems to me that the purpose behind being a prevailing
11:43:37 10 party under 1988 fits in that situation and that the
11:43:44 11 Plaintiffs should be entitled to some award of fees.
11:43:47 12 Now, what the amount is and what the hourly rate is, et
11:43:51 13 cetera, you know, something that we have to sort
11:43:53 14 through. And I agree that the hourly rates in this
11:44:00 15 district for an award of fees in a civil rights context
11:44:04 16 are lower than what the reasonable prevailing rate is in
11:44:09 17 a lot of other contexts.

11:44:11 18 But, I guess, Mr. Prial, what is your
11:44:37 19 position?

11:44:38 20 MR. PRIAL: The more I sit here listening to
11:44:40 21 Mr. Rupp, the more I thought I would stay quite.

11:44:45 22 No, but in all seriousness, Judge. A few
11:44:49 23 points. I don't think that the history behind the
11:44:55 24 stipulated injunction is such that, you know, the County
11:45:00 25 just thought they had such a strong motion. It was that

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11:45:04 2 they were going to get the compliance they were looking
11:45:07 3 for during the middle of the pandemic.

11:45:10 4 THE COURT: Why did they agree to certain
11:45:12 5 factual findings. You could have a stipulated
11:45:15 6 preliminary injunction without the factual findings that
11:45:17 7 were included in that stipulation.

11:45:19 8 MR. PRIAL: There is an easy answer for it,
11:45:22 9 Judge, is Plaintiff's counsel drafted it. And I
11:45:25 10 understand there was some negotiation, but I think the
11:45:27 11 county is also under a lot of stress. They don't have a
11:45:32 12 huge law firm working for them, at least they didn't at
11:45:35 13 the time. And they wanted to get to the ultimate
11:45:37 14 result.

11:45:38 15 THE COURT: But they signed a stipulation
11:45:40 16 that, among other things, included this paragraph, which
11:45:43 17 says, "The Court also has reviewed these submissions and
11:45:47 18 finds that the Plaintiffs have shown that their 1st
11:45:50 19 Amendment and 14th Amendment claims are likely to
11:45:53 20 prevail. That denying them the relief they seek would
11:45:57 21 lead to irreparable injury. And that granting relief
11:46:01 22 would not harm the public interest. They didn't have to
11:46:05 23 sign something saying that.

11:46:06 24 MR. PRIAL: I agree, Judge, but, however,
11:46:08 25 it's still a stipulated injunction. And I also would

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11:46:11 2 agree with counsel, I didn't find a case either that
11:46:14 3 said, you know, that dealt with the specific stipulated
11:46:18 4 injunction. I did find multiple cases that did have
11:46:23 5 stipulated injunctions that were at issue, however, it
11:46:25 6 was not at this procedural stage. You probably saw the
11:46:28 7 same cases. Where the issue was what did the injunction
11:46:31 8 say. In a lot of those cases, or at least one that I
11:46:35 9 recall, the issue was the fees that were called for in
11:46:39 10 the injunction itself. And here we don't have it. It
11:46:43 11 says the Court may award fees. And I do recall that
11:46:47 12 there was some discussion over that specific language.

11:46:51 13 But, Judge, if I could just quickly on the
11:46:54 14 chronology, I mean, I'm agreeing with my adversary here
11:47:01 15 that I think you have the initial pleading as a
11:47:07 16 stand-alone issue. I see it, and I don't think -- and
11:47:12 17 no court, that is probably why there isn't any court
11:47:15 18 that has done this, because those issues were resolved.
11:47:19 19 That is what the county certainly thought, you know. In
11:47:23 20 entering into it they thought, we're done with this.
11:47:25 21 Let's move on. And then we have the amended complaint.
11:47:28 22 I don't see the connection just because it's the same
11:47:33 23 caption between those claims. You have, in my mind, you
11:47:38 24 have a cut off after that initial, as Mr. Rupp called
11:47:44 25 it, self-contained pleading, where they didn't seek

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11:47:47 2 nominal damages, or, I'm sorry, they didn't seek

11:47:51 3 compensatory damages. And then the later complaint,

11:47:53 4 following the injunction, the injunction is the thing

11:47:56 5 that would ultimately give prevailing party status.

11:48:00 6 Right. It's not anything after that.

11:48:01 7 I mean, if we were to continue on and carry

11:48:06 8 on this entire case, Plaintiffs are certainly free under

11:48:09 9 1988 case to make another application for fees. This

11:48:12 10 application of fees is simply based on their view they

11:48:16 11 are the prevailing party under that injunction.

11:48:17 12 THE COURT: But, I guess, I'm confused as to

11:48:20 13 what you're arguing. I mean, in other words, there is

11:48:23 14 no case that I have seen that determines prevailing

11:48:27 15 party status in the middle of a lawsuit. But you seem

11:48:31 16 to be supporting that I could do that.

11:48:32 17 MR. PRIAL: Correct, Judge. Well, I don't

11:48:36 18 know if the case law provides for that specific

11:48:41 19 authority, but I don't know that it doesn't.

11:48:43 20 THE COURT: Well, it doesn't. You know, my

11:48:45 21 last decision in September of 2022, I specifically said,

11:48:50 22 hey, folks, let's address it. Nobody cited any case law

11:48:54 23 about it. I cited case law saying that you can't

11:48:57 24 determine it mid stream unless all of the pled claims

11:49:02 25 are moot and there is no case supporting that.

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11:49:06 2 MR. PRIAL: Right. All of -- what I'm
11:49:08 3 saying, all of the pled claims at that point in time of
11:49:12 4 the injunction. And I think that Mr. Rupp is saying the
11:49:15 5 same thing. I obviously have to speak to my clients,
11:49:27 6 but the concept of dropping the compensatory federal
11:49:28 7 claims would probably be okay with us. If we are
11:49:30 8 talking about cutting it off and putting us back in the
11:49:32 9 position of where we were in November of 2020, I'm
11:49:34 10 assuming that would be okay with my clients. And then
11:49:36 11 the concept -- if the concept then is who is the
11:49:39 12 prevailing party at that point in time, then, you know,
11:49:45 13 that makes sense to me.

11:49:46 14 THE COURT: And I take it your clients would
11:49:48 15 not be arguing that the discontinuance of the
11:49:52 16 constitutional claims for damages or the discontinuance
11:49:57 17 of the state law claims would -- let me finish the
11:50:01 18 question -- would be taken into consideration by the
11:50:05 19 Court in determining who the prevailing party is.

11:50:08 20 MR. PRIAL: Right. I don't think that would
11:50:10 21 be fair.

11:50:12 22 THE COURT: Okay. Here is what I'm going to
11:50:14 23 do. And I don't want to make more work for anybody.
11:50:18 24 But, with the pending motion as it exists right now with
11:50:21 25 the second amended complaint, I'm denying it without

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11:50:25 2 prejudice with leave to renew. You can work on a
11:50:28 3 stipulation that would resolve the federal claims,
11:50:35 4 presumably discontinue the constitutional claims seeking
11:50:39 5 money damages with prejudice, I guess, because the
11:50:44 6 Plaintiffs, you could say right in there, the Plaintiffs
11:50:48 7 have obtained all of the relief they were seeking
11:50:51 8 basically through the granting of the preliminary
11:50:55 9 injunction. And then discontinuing the state law claims
11:50:58 10 without prejudice to be re-filed in state court. And I
11:51:02 11 would make sure that you're all on the same page in
11:51:05 12 terms of when that filing would have to be from a
11:51:08 13 timeliness statute of limitations perspective. And if
11:51:12 14 you agree on something, present it to me, then I -- what
11:51:18 15 I would also suggest you do in that stipulation is that,
11:51:23 16 indicate that upon the approval of that, that the most
11:51:28 17 recent application for attorneys fees, which was filed
11:51:33 18 at docket 37, should be deemed renewed and you don't
11:51:48 19 have to resubmit anything. In other words, it can just
11:51:51 20 -- if I approve this stipulation, then that motion for
11:51:54 21 attorney fees would be deemed renewed. And as far as
11:51:58 22 I'm concerned, I think it's briefed. I don't think
11:52:03 23 anybody is suggesting that we need to have a hearing on
11:52:05 24 either the prevailing party status or the amount of the
11:52:09 25 fees, but I want to check with both of you.

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11:52:11 2 Do you agree with that, Mr. Rupp?

11:52:13 3 MR. RUPP: I would only support a hearing if
11:52:15 4 the Court thought it was necessary, so I would say no.

11:52:18 5 THE COURT: Mr. Prial.

11:52:19 6 MR. PRIAL: Agreed, Judge. And that was
11:52:21 7 going to be part of my argument that there was never any
11:52:27 8 hearing. We could still have oral argument on the
11:52:29 9 motion.

11:52:29 10 THE COURT: We could have oral argument on
11:52:32 11 the motion if you would like to do that. I know we
11:52:33 12 haven't addressed the amount of the fees.

11:52:35 13 MR. PRIAL: And I would have arguments
11:52:38 14 opposing prevailing party status.

11:52:41 15 THE COURT: We can certainly do that. But
11:52:43 16 what I would suggest is you incorporate, basically upon
11:52:46 17 my approval of the stipulation, that the motion would be
11:52:49 18 deemed renewed, the papers would be filed as they
11:52:52 19 currently exist, and I would reference those docket
11:52:56 20 numbers. And then if I approve that stipulation and so
11:52:59 21 order it, then I would set an oral argument date on the
11:53:03 22 motion.

11:53:03 23 But at that point, that way, the case would
11:53:07 24 have reached a conclusion. And, therefore, I wouldn't
11:53:12 25 feel hamstrung in deciding this issue by what I'm seeing

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11:53:15 2 in the case law. Does this make sense to everybody?

11:53:18 3 MR. RUPP: It does. And I appreciate your

11:53:20 4 Honor walking through that with both of us. I do

11:53:23 5 obviously need to check with the client and co-counsel

11:53:25 6 and the firm and see if I'm correct in my recollection

11:53:28 7 that it's really the defamation case, which is a state

11:53:34 8 case, that we wanted to ride here.

11:53:37 9 THE COURT: I still go back to the fact

11:53:38 10 that, look it, if the Plaintiffs decided they were going

11:53:42 11 to pursue the constitutional claims for damages and if

11:53:45 12 they ultimately recover damages, even potentially

11:53:48 13 nominal damages on the constitutional claims, I think

11:53:51 14 that is a factor the Court can take into account in

11:53:54 15 determining prevailing party status. And this is why I

11:53:59 16 think it doesn't make a lot of sense, because at that

11:54:02 17 point, the attorney fees are going to be significantly

11:54:05 18 higher than they are right now. So the risk to the

11:54:08 19 Defendants is, in my view, a serious one here. I

11:54:11 20 understand what you're saying, Mr. Rupp, that your firm

11:54:13 21 has been carrying this lawsuit, and I'm sure that is a

11:54:16 22 financial strain. I get it. I was in private practice,

11:54:19 23 was in a small firm, I understand that. But I really

11:54:23 24 think from a logical perspective here there is a real

11:54:27 25 risk to the Defendants that they could be facing a

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11:54:30 2 significant fee award if this case were to play out in
11:54:35 3 the normal course. That is why in my original decision
11:54:42 4 I suggested the parties should try to mediate this
11:54:45 5 because I don't know that it's realistic for the
11:54:47 6 Defendants to think that there is not going to be a fee
11:54:51 7 award here. I think it's really going to be a question
11:54:54 8 of what the amount might be. And so the longer this
11:54:58 9 thing gets litigated, the longer there is a contest over
11:55:05 10 the fee application and what it should be and we have
11:55:09 11 another oral argument and so forth, and I think it just
11:55:13 12 makes the fees go up.

11:55:16 13 But I'm not going to set a deadline for
11:55:20 14 this. It's up to you to decide how you want to pursue
11:55:25 15 it. But if you present a stipulation that everybody
11:55:28 16 agrees to along the lines of what we talked about here,
11:55:31 17 then I would envision myself approving that and then
11:55:35 18 setting oral argument.

11:55:36 19 MR. PRIAL: And if not, we're just back here
11:55:39 20 again on the same motion.

11:55:40 21 THE COURT: Say that again.

11:55:41 22 MR. PRIAL: And if we do not submit a
11:55:44 23 stipulation --

11:55:44 24 THE COURT: At this point, I'm denying the
11:55:47 25 motion without prejudice as premature because the

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11:55:51 2 lawsuit is still pending and it can be renewed at the
11:55:57 3 conclusion of the case. Whether that conclusion of the
11:56:00 4 case comes through a stipulation that the parties agree
11:56:02 5 upon in the near future or whether it occurs down the
11:56:07 6 road after the case is more vigorously litigated
11:56:12 7 ultimately remains to be seen.

11:56:14 8 MR. PRIAL: Understood. Thank you, Judge.

11:56:15 9 THE COURT: Any questions that either side
11:56:17 10 has about this?

11:56:18 11 MR. RUPP: Judge, only, and I can certainly
11:56:21 12 check the docket, but I didn't do it before today, but
11:56:24 13 if this doesn't work out, if I can't reach an agreement,
11:56:27 14 either my clients don't authorize it, counsel doesn't
11:56:30 15 agree to it in a form that we can present to the Court,
11:56:33 16 in terms of moving the case along, are we under a
11:56:38 17 scheduling order? What procedurally where are we at
11:56:42 18 this point? Because we've been focused on these fee
11:56:46 19 requests for a couple of years, admittedly, and I have
11:56:49 20 an obligation to the client. I do want to move the case
11:56:54 21 forward and don't want to run afoul of any orders.

11:56:56 22 THE COURT: So Judge Payson is the
11:56:58 23 magistrate assigned, and I'm looking, she issued an
11:57:01 24 order, an amended scheduling order in May of 2023, that
11:57:05 25 set the deadline to join parties and then pleadings,

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11:57:12 2 August 21; fact discovery to be completed by February
11:57:16 3 26, 2024.

11:57:17 4 MR. RUPP: I apologize, Judge. I don't mean
11:57:19 5 to make you my clerical guide. I will look at the
11:57:24 6 docket. That was the part I missed. As soon as you
11:57:25 7 mentioned Judge Payson, I remembered a scheduling order
11:57:29 8 and my colleague Chad Davenport was on top of it. So
11:57:34 9 we're good. No other orders pending from this Court and
11:57:37 10 we'll take care of this issue, if we can, and proceed
11:57:40 11 with the litigation if we can't.

11:57:41 12 THE COURT: That was at docket 53.

11:57:44 13 MR. RUPP: Thank you, Judge.

11:57:45 14 THE COURT: You're welcome.

11:57:46 15 MR. RUPP: I knew that came out.

11:57:48 16 THE COURT: All right. Anything else from
11:57:49 17 either side?

11:57:49 18 MR. PRIAL: Not from me.

11:57:51 19 THE COURT: Thank you very much everybody.
11:57:52 20 Have a good rest of the day.

11:57:54 21 MR. RUPP: Thanks.

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
of the record of proceedings in the above-entitled
matter.

S/ Karen J. Clark, RPR

Official Court Reporter